

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

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ALEXANDER L. STEVENS  
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NO. 82-5698

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HUGH W. MELSON,

PETITIONER,

v.

STATE OF TENNESSEE,

RESPONDENT.

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ON PETITION FOR THE WRIT OF CERTIORARI  
TO THE SUPREME COURT OF TENNESSEE

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the evidence presented at trial was sufficient to convict the petitioner of murder in the first degree beyond a reasonable doubt as required by the due process clause of the Fourteenth Amendment.
2. Whether the petitioner's Eighth Amendment rights were violated by the fixing of excessive bail.
3. Whether the petitioner's rights to a fair and impartial trial as guaranteed by the Sixth Amendment to the United States Constitution, and to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution were violated by the failure to grant him a change of venue.
4. Whether the petitioner's Sixth Amendment right to a fair and impartial trial and his Fourteenth Amendment right to due process were violated by admission of certain photographs of the crime scene.
5. Whether the petitioner's Sixth Amendment right to a fair and impartial trial and his Fourteenth right to due process were violated by admission of various types of testing.
6. Whether the petitioner's right to an impartial jury under the Sixth, Eight and Fourteenth Amendments to the United States Constitution was violated by imposition of a "death qualified" jury and by excusal for cause of all who opposed the death penalty.
7. Whether the petitioner's Sixth Amendment right to effective assistance of counsel and his Fourteenth Amendment right to due process were violated by the refusal of the trial court to grant a continuance of the trial.

8. Whether the petitioner's Fourth Amendment right was violated by the admission of evidence seized as a result of an alleged illegal arrest.

9. Whether the petitioner's Fourth Amendment right was violated by the admission of evidence seized as a result of an alleged illegal search.

10. Whether the Tennessee Death Penalty Act is unconstitutional because it violates the Eighth and Fourteenth Amendments to the Constitution of the United States.

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OPINION BELOW

The opinion of the Supreme Court of Tennessee is reported at 638 S.W.2d 342.

JURISDICTION

Petitioner seeks to invoke this Court's jurisdiction under 28 U.S.C. § 1257. Respondent submits that this record does not present a substantial federal question. The judgment of the Supreme Court of Tennessee was entered on August 16, 1982. Petitioner's petition to rehear was denied on September 7, 1982. The petitioner timely filed his Petition for Writ of Certiorari with this Court.

STATEMENT OF THE CASE

On May 6, 1980, the Madison County, Tennessee Grand Jury returned an indictment charging the petitioner, Hugh W. Nelson, with murder in the first degree. On October 14, 1980, jury selection began and continued until completion on October 15, 1980. Following the petitioner's plea of not guilty, the trial commenced in the Circuit Court of Madison County on October 17, 1980. On October 17, 1980, the jury found the petitioner guilty of murder in the first degree. That same day, after a bifurcated sentencing hearing, the jury sentenced the petitioner to death by electrocution. The jury found unanimously the following statutory aggravating circumstances: (1) the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind, and (2) the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another. The jury unanimously found no mitigating circum-

stances sufficiently substantial to outweigh the statutory aggravating circumstances listed above. The trial court approved the verdict and sentence by overruling petitioner's motion for a new trial on December 5, 1980.

Petitioner appealed to the Supreme Court of Tennessee, which affirmed the judgment on August 16, 1982. A petition to rehear was denied on September 7, 1982.

REASONS FOR DENYING THE WRIT

Respondent submits that the Supreme Court of Tennessee correctly affirmed the trial court's judgment approving the jury verdict finding the petitioner guilty of murder in the first degree and fixing his punishment at death by electrocution. The Supreme Court of Tennessee did not decide a federal question of substance not heretofore determined by the Court or decide such question in a way not in accord with the applicable decisions of this Court; nor did the Supreme Court of Tennessee decide a federal question in a way in conflict with another state court of last resort or of a federal court of appeals. See Supreme Court Rule 17.1. There being no special and important reasons for a grant of certiorari in this case, the Court in its sound judicial discretion should deny the writ sought here.

ARGUMENT

I.

THE SUPREME COURT OF TENNESSEE FULLY  
CONSIDERED AND CORRECTLY REJECTED PETITIONER'S  
CONTENTION THAT THE EVIDENCE AT TRIAL WAS LEGALLY  
INSUFFICIENT TO SUSTAIN HIS CONVICTION.

The petitioner contends that the evidence at trial was insufficient to sustain the jury's verdict of guilty for first degree murder. In examining this complaint, the Supreme

Court of Tennessee found that the evidence was sufficient to sustain the jury's verdict beyond a reasonable doubt under the standard set forth in Jackson v. Virginia, 443 U.S. 307 (1979). State v. Nelson, 638 S.W.2d 347-350 (Tenn. 1982). Since the evidence included proof that the victim and the petitioner had an argument over the petitioner's theft of gasoline, that a ball peen hammer found in the petitioner's truck could have been the murder weapon, that hair found on the hammer and embedded in a substance suspected to be blood matched the victim's hair, that hair found on the victim's blouse matched the petitioner's hair, and that spattered bloodstain patterns on the petitioner's clothing could have resulted from a head being repeatedly struck with a blunt instrument, the Supreme Court's conclusion was warranted by the record and, therefore, the allegation does not warrant the granting of certiorari.

## II.

THE SUPREME COURT OF TENNESSEE FULLY  
CONSIDERED AND CORRECTLY REJECTED PETITIONER'S  
CONTENTION THAT HIS EIGHTH AMENDMENT RIGHTS WERE  
VIOLATED BY EXCESSIVE BAIL.

The petitioner contends that his Eighth Amendment rights were violated by the fixing of excessive bail. The Supreme Court of Tennessee found that the matter of bail was discretionary with the trial court, that the record failed to show that the trial court's purpose in setting bail in the amount of \$200,000 was to prevent the petitioner from gaining his freedom rather than to assure his presence in court, and that even if the amount fixed was excessive, the record does not show that the outcome of the case was more probably than not affected. 638 S.W.2d at 358. Since the record contains no transcripts of the bond hearings, nor any other evidence to support the petitioner's contention, the respondent submits that the conclusion of the Supreme Court of Tennessee was war-

ranted and, therefore, the allegation does not merit the granting of certiorari.

### III.

THE SUPREME COURT OF TENNESSEE FULLY  
CONSIDERED AND CORRECTLY REJECTED PETITIONER'S  
COMPLAINT THAT THE TRIAL COURT ERRED IN  
DENYING HIS MOTION FOR A CHANGE OF VENUE.

The petitioner contends that due to the nature and extent of the pre-trial publicity in this case, he was deprived of his right to a fair trial by the trial court's refusal to grant a change of venue. In examining this complaint, the Supreme Court of Tennessee found that although there was pre-trial publicity at the time of the crime, the publicity died down prior to trial, that all of the media reportage was factual in nature except one editorial, and that none of the news articles was sensational or otherwise improper. 638 S.W.2d at 359-360. The Court concluded that the trial court did not abuse its discretion in denying the motion for a change of venue. 638 S.W.2d at 361-362. The respondent submits that this conclusion is warranted by the record and, therefore, the allegation does not merit the granting of certiorari. As stated by this Court in Dobbert v. Florida, 432 U.S. 282 (1977), the petitioner "has simply shown that the community was made well aware of the charges against him and asks [the court] on that basis to presume unfairness of constitutional magnitude at his trial." 432 U.S. at 303

### IV.

THE SUPREME COURT OF TENNESSEE FULLY  
CONSIDERED AND CORRECTLY REJECTED THE  
PETITIONER'S COMPLAINT THAT THE TRIAL COURT  
ERRED IN ADMITTING CERTAIN PHOTOGRAPHS OF  
THE CRIME SCENE.

The petitioner contends that his right to a fair trial

was denied by the admission of certain photographs of the crime scene. The Supreme Court of Tennessee concluded that these photographs were relevant and admissible to show the elements of premeditation and deliberation, to show the basis of the investigating officers' conclusory opinion, objected to by the defense on cross-examination, that the room was covered with blood, and to aid the jury in evaluating the testimony of the blood spatter expert who based part of his analysis upon the photographs. 638 S.W.2d at 364-365. The respondent submits that this conclusion is supported by the record and, therefore, the allegation does not merit the granting of certiorari.

V.

THE SUPREME COURT OF TENNESSEE FULLY  
CONSIDERED AND CORRECTLY REJECTED THE  
PETITIONER'S COMPLAINT THAT HIS RIGHT  
TO A FAIR TRIAL WAS DENIED BY THE  
ADMISSION OF VARIOUS TESTS.

The petitioner contends that he was denied a fair trial by the admission of testimony by a blood spatter expert who analyzed the blood spatters on the petitioner's clothing and at the crime scene, and the admission of the testimony of two FBI Special Agents concerning the analysis of the petitioner's clothing for blood and comparison of hair samples taken from the petitioner and the victim. In examining this complaint, the Supreme Court of Tennessee concluded that the blood spatter expert was properly qualified and his testimony admissible, 638 S.W.2d at 363-364; and that the testimony of the FBI agents was clearly admissible. 638 S.W.2d at 365-366; United States v. Brady, 595 F.2d 359 (6th Cir. 1979). The respondent submits that this conclusion is warranted by the record and, therefore, the allegation does not merit the granting of certiorari.

VI.

THE SUPREME COURT OF TENNESSEE FULLY  
CONSIDERED AND CORRECTLY REJECTED THE  
PETITIONER'S COMPLAINT THAT THE TRIAL COURT  
ERRED IN EXCUSING FOR CAUSE CERTAIN JURORS  
WHO COULD NOT FOLLOW THE LAW AND IMPOSE  
THE DEATH PENALTY.

In reliance upon Witherspoon v. Illinois, 391 U.S. 510 (1968), the petitioner contends that the trial court erred in improperly disqualifying prospective jurors who could not consider the imposition of the death penalty in this case. The Supreme Court of Tennessee found the complaint to be without merit. 638 S.W.2d at 362. The record shows that all of the jurors in question testified that they could not follow the law in considering the range of punishment, that they would not consider the death penalty, and that they would automatically vote against the imposition of a sentence of death. Since the action of the trial court was proper under Witherspoon, supra, the allegation does not merit the granting of certiorari.

VII.

THE SUPREME COURT OF TENNESSEE FULLY  
CONSIDERED AND CORRECTLY REJECTED PETITIONER'S  
COMPLAINT THAT HE WAS DENIED A FAIR TRIAL BY  
THE REPUSAL OF THE TRIAL COURT TO GRANT  
A CONTINUANCE.

The petitioner contends that he was denied a fair trial by the refusal of the trial judge to grant him a continuance of his trial. In reviewing this complaint, the Supreme Court of Tennessee found that the record did not show that the trial court abused his discretion in denying the continuance. 638 S.W.2d at 359. Since the record does not contain a transcript of any hearing on this matter and there is no evidence that the petitioner was prejudiced by the denial, the Supreme Court's conclusion was warranted and, therefore, the allegation does not merit the granting of certiorari.

VIII.

THE SUPREME COURT OF TENNESSEE FULLY  
CONSIDERED AND CORRECTLY REJECTED PETITIONER'S  
CONTENTION THAT HIS ARREST WAS ILLEGAL AND THAT  
EVIDENCE SEIZED AS A RESULT OF THAT ARREST  
SHOULD HAVE BEEN SUPPRESSED.

The petitioner contends that his warrantless arrest was without probable cause and that, therefore, the evidence taken from him incident to the arrest -- his cap, shirt, trousers, and boots -- was inadmissible at trial. In examining this complaint, the Supreme Court of Tennessee concluded that the trial court correctly held that probable cause existed at the time of the petitioner's arrest. 638 S.W.2d at 350-351. The record supports that conclusion. Officers investigating the homicide testified that they arrived at the murder scene, determined that the victim was dead, and observed the appearance of the scene. They then conversed with the victim's daughter-in-law, who related that she had talked with the victim earlier that day, that the victim stated that she had caught the petitioner stealing gasoline, that the victim had confronted the petitioner, that an argument ensued, and that the petitioner had become very upset. The victim told the defendant she would have to tell her husband about the theft of the gasoline. Although the victim did not positively state that the petitioner had threatened her, she told her daughter-in-law that she was afraid to leave the house. As a result of this report, the officers proceeded to the home of a retired farm hand, where they found the petitioner. The petitioner was taken into custody and transported by car to the murder scene. Upon arriving there, the officers noticed what looked like spots of blood on the petitioner's clothing and formally arrested him, advising him of his rights. All of this activity took place within an hour of the discovery of the victim's body.

In Beck v. Ohio, 379 U.S. 89 (1964), this Court stated:

Whether that arrest was constitutionally valid depends in turn upon whether at the moment the arrest was made, the officers had probable cause to make it -- whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.

379 U.S. at 91. In the instant case, probable cause existed at the time the officers took the petitioner into custody on the basis of what the victim's daughter-in-law had related. Certainly probable cause existed after they observed what was apparently blood on his clothing in view of the quantity of blood shed at the murder scene. The respondent submits that the petitioner's allegation does not merit the granting of certiorari.

## IX.

THE SUPREME COURT OF TENNESSEE FULLY  
CONSIDERED AND CORRECTLY REJECTED THE  
PETITIONER'S COMPLAINT THAT THE SEARCH OF  
HIS TRUCK WAS ILLEGAL AND THAT THE EVIDENCE  
SEIZED SHOULD HAVE BEEN SUPPRESSED.

The petitioner contends that the search warrant authorizing the search of his truck was invalid and, therefore, the items seized therein should have been suppressed at trial. In reviewing the petitioner's complaint, the Supreme Court of Tennessee found that the search warrant was valid. 638 S.W.2d at 352-358. The record supports that finding.

A. The record does not show that reckless misrepresentations were made in the search warrant affidavit.

The record in the instant case does not preponderate against the trial court's finding that there had been no false statements either intentionally or recklessly made by the affiant. See 638 S.W.2d at 352.

B. The search warrant affidavit was not defective for failure to set forth material facts establishing the credibility of citizen informants.

The petitioner argues that there is nothing in the affidavit to show that the above-listed sources of information were credible or that the information was reliable. The respondent submits that the affidavit which referred to information supplied by citizen-informants need not set forth material establishing the credibility of the citizen-informants. United States v. Bell, 457 F.2d 1231 (5th Cir. 1972); United States v. Rollins, 522 F.2d 160 (2d Cir. 1975), cert. denied, 411 U.S. 920 (1973); United States v. McCoy, 478 F.2d 176 (10th Cir.), cert. denied, 414 U.S. 828 (1973). The name of the "reliable source" was not required to be disclosed in the affidavit. United States v. Harris, 403 U.S. 573 (1971).

C. The search warrant did not authorize a general, exploratory search.

The warrant authorizes the seizure of "a blunt object, knife, or object capable of being used to strike, stab, cut, penetrate, and other paraphernalia pertaining to this incident." This description did not authorize a general, exploratory search, but sufficiently limited the authority to search while giving the officers needed discretion. See Anderson v. Maryland, 427 U.S. 463 (1976).

D. The search and seizure did not exceed the authority of the warrant.

The petitioner contends that the affidavit requests authority to search any box or container in the truck, but the warrant does not specifically include such box or container. It authorizes the search of "the truck." The respondent submits, however, that the outside of the warrant -- that which would show when the warrant was folded and served -- specifies "1974

Green Ford Pickup Truck", "License No. 7J 469A and any containers and boxes found therein." As the Supreme Court of Tennessee found, the conclusion is inescapable that the omission of "boxes and containers" from the warrant was merely inadvertent. The warrant was meant to authorize the search of the truck's contents.

The respondent submits that the petitioner's allegations concerning the validity of the search warrant do not merit the granting of certiorari.

X.

THE SUPREME COURT OF TENNESSEE FULLY  
CONSIDERED AND CORRECTLY REJECTED PETITIONER'S  
CONTENTION THAT THE TENNESSEE DEATH PENALTY STATUTES  
ARE UNCONSTITUTIONAL.

A. Tenn. Code Ann. § 39-2404(i)(5) and (6) are not constitutionally vague or overbroad.

The petitioner contends that Tenn. Code Ann. § 39-2404 (i)(5), an aggravating circumstance which provides "the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind", and Tenn. Code Ann. § 39-2404 (i)(6), an aggravating circumstance which provides "the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another", are vague and unconstitutional as written. With respect to § 39-2404(i)(5), the same allegation was raised in Proffitt v. Florida, 428 U.S. 242, 255-256 (1976), in which this Court held that an identical aggravating circumstance under the Florida statute was not impermissibly vague as it has been construed by the Florida Supreme Court. See Gregg v. Georgia, 420 U.S. 153, 200-203 (1976). See also Spinkellink v. Wainwright, 578 F.2d 582, 610-612 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979). The Tennessee Supreme Court has construed the Tennessee statute constitutionally. State v. Pritchett, 621

With respect to Tenn. Code Ann. § 39-2404(i)(6), the issue presented here was not raised in the state trial or Supreme Court and is now presented for the first time. In any event, the words of § 39-2404(i)(6) are sufficiently precise to put an individual on notice of the proscribed conduct. See United States v. Harris, 347 U.S. 612 (1954). Nor is the statute vague or overbroad as applied to the petitioner under the facts which show that the victim threatened to expose his alleged theft of gasoline and that the petitioner made statements concerning his being in trouble over the theft.

B. The petitioner's sentence of death is not excessive or disproportionate to the penalty imposed in similar cases, nor is the review procedure in Tennessee constitutionally inadequate.

The petitioner contends that his sentence of death is disproportionate to the penalty imposed in similar cases and that the proportionality review procedure in Tennessee is constitutionally inadequate. The respondent submits that comparing petitioner's case with numerous others illustrates that imposition of the death penalty in this case does not demonstrate that the jury was aberrant, arbitrary or capricious. See State v. Berry, 592 S.W.2d 553 (Tenn. 1980), rev'd on other grounds (brutal beating with ball peen hammer), and State v. Austin, 618 S.W.2d 738 (Tenn. 1981) (killing to eliminate a witness to illegal activity). Nor is the sentencing review process established under Tenn. Code Ann. § 39-2406 and Rule 12, Rules of the Supreme Court of Tennessee, unconstitutionally inadequate to afford a meaningful proportionality review. The Tennessee Supreme Court has several times compared the circumstances of a case under review with those of previous cases in which it has assessed the imposition of death sentences and, by following this procedure, the Court has in effect adopted the type of proportion-

ality review constitutionally mandated. See Proffitt v. Florida, 428 U.S. 242, 258-259. See also State v. Pritchett, 621 S.W.2d 127 (Tenn. 1981); State v. Strouth 620 S.W.2d 467 (Tenn. 1981); State v. Coleman, 619 S.W.2d 112 (Tenn. 1981); State v. Groseclose, 615 S.W.2d 142 (Tenn. 1981).

C. Tenn. Code Ann. § 39-2404(h) is not unconstitutional.

The petitioner contends that Tenn. Code Ann. § 39-2404(h), which prohibits the sentencing jury from being informed that their failure to agree unanimously on punishment requires the trial court to impose a life sentence, is unconstitutional. This Court has previously found that this issue does not warrant the granting of certiorari and the same finding should be made in the instant case. Houston v. Tennessee, 449 U.S. 891 (1980).

D. Tenn. Code Ann. § 39-2404(j) is not unconstitutional.

The petitioner contends that Tenn. Code Ann. § 39-2404(j) is unconstitutional in failing to require the jury to specify what mitigating circumstances have been considered and found to be absent and insufficient to outweigh the aggravating circumstances, thus precluding review. The respondent submits that so long as the record reveals the evidentiary basis for the imposition of the death penalty so as to insure that the appellate court may conduct a review of the proceedings and insure that the penalty was not imposed arbitrarily or capriciously, the concerns of Furman v. Georgia, 408 U.S. 238 (1972, are met. Gardner v. Florida, 430 U.S. 349 (1977). Thus, written findings of mitigating circumstances are not required. See Andrews v. Morris, 607 P.2d 816, 823 (Utah 1980), cert. denied, 449 U.S. 891. The record in this case discloses all of the evidence offered in mitigation.

E. Tenn. Code Ann. § 39-2404(f) and (g) is not unconstitutional.

The petitioner contends that Tenn. Code Ann. § 39-2404(f) and (g) unconstitutionally fails to specify the burden of proof and standard of proof to be used in determining whether aggravating circumstances outweigh mitigating circumstances. This Court has previously found that this issue does not warrant the granting of certiorari and the same finding should be made in the instant case. Houston v. Tennessee, 449 U.S. 891 (1980).

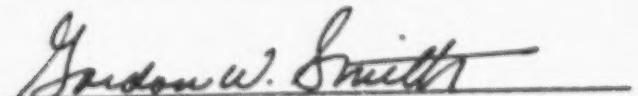
The respondent submits that the petitioner's constitutional challenges do not merit the granting of certiorari.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

  
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